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No. 86-562

In the Supreme Court of the United States

OCTOBER TERM, 1986

DOROTHY M. THOMPSON, ET AL., PETITIONERS

v.

RALPH E. KENNICKELL, JR., PUBLIC PRINTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the United States is liable for post-judgment interest whenever it unsuccessfully appeals a money judgment rendered against it by a federal district court.

1. In 1980, petitioners were awarded front and back pay in an action against the Government Printing Office under the Equal Pay Act of 1963, 29 U.S.C. 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2. That judgment was substantially affirmed on appeal. Pet. App. 2-3. See *Thompson* v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982).

In 1984, petitioners moved the district court for post-judgment interest on this award under 28 U.S.C. 1961(a), which provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district

court." Petitioners acknowledged that, prior to 1982, this language had not been interpreted to waive the government's sovereign immunity against awards of post-judgment interest. They contended, however, that amendments to Section 1961 that were effected by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 302, 96 Stat. 55-56, authorized awards of post-judgment interest against the United States. See Pet. App. 3. The district court rejected this argument, finding that the amendments were not "so clear, unambiguous, express or explicit [as] to warrant the interpretation argued by the [petitioners]" (*id.* at 28).

2. The court of appeals affirmed in a comprehensive opinion that reviewed both the law prior to 1982 and the changes worked by the Courts Improvement Act (Pet. App. 1-25). Prior to 1982, the court explained, Section 1961 (which made no express mention of suits against the United States) authorized awards of post-judgment interest only against private parties, to be calculated at the rate allowed by state law. Post-judgment interest was made available against the United States under three *other* statutory provisions (28 U.S.C. 2411 and 2516, and 31 U.S.C. (1976 ed.) 724a (now 31 U.S.C. 1304)) in specifically enumerated categories of cases—internal revenue cases, Federal Tort Claims Act (FTCA) cases, so-called Little Tucker Act cases (those arising under 28 U.S.C. 1346(a)(2)), and Court of Claims cases. See Pet. App. 4-7. Under these provisions, "the rate of interest and the time period during which the federal government might be obligated to pay such interest varied widely depending on the nature of the judgment against it" (*id.* at 7).

In relevant part, the court continued, the Courts Improvement Act amended Section 1961(a) to provide that post-judgment interest awarded by federal district courts would be paid at a uniform national rate, instead of at rates set by

state law.[1] The Act also added a Section 1961(b), which provides that "[i]nterest shall be computed daily to the date of payment except as provided in section 2516(b) of this title [which governs the time period for post-judgment interest in cases involving unsuccessful appeals to the Supreme Court from Federal Circuit decisions] and section 1304(b) of title 31 [which governs the time period for the payment of post-judgment interest on judgments against the United States payable out of the permanent judgment appropriation fund]." A new Section 1961(c)(1), in turn, excepted internal revenue cases from the rules set out in Sections 1961(a) and (b), providing instead that interest in such cases would be awarded at rates set out in the Internal Revenue Code. And finally, the Courts Improvement Act repealed 28 U.S.C. 2411(b), which previously had authorized awards of post-judgment interest against the government in FTCA and Little Tucker Act cases. See Pet. App. 8-10.

Having reviewed the applicable law, the court explained that the Courts Improvement Act must be read against the background of the "no-interest rule," a doctrine that consistently has been applied by this Court to mean that "[t]he waiver of [sovereign] immunity for an award of interest must be affirmatively and separately contemplated by Congress" (Pet. App. 24; see *id.* at 3-4). With this principle in mind, the court rejected petitioners' argument that the Courts Improvement Act makes the United States liable for post-judgment interest in every case in which it takes an

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[1]The language actually authorizing awards of interest—"[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court"—was identical in the pre-and post-1982 versions of Section 1961.

unsuccessful appeal from an adverse district court judgment.[2] Here, the court of appeals noted that the amended version of Section 1961(a) "does not expressly refer to judgments awarded against the federal government," and the court found unpersuasive petitioners' argument that Sections 1961(b) and (c) would be rendered nugatory unless Section 1961(a) were read to cover all district court actions to which the United States is a party. Pet. App. 10-11.

Petitioners argued that, if Section 1961(a) had not been intended to require the government to pay post-judgment interest in all cases, it would have been unnecessary for Congress, in Section 1961(b), to create exceptions (for Federal Circuit judgments and for judgments paid out of the permanent judgment appropriation fund) to Section 1961(b)'s rule requiring computation of interest to the date of payment. The court explained, however, that "Section 1961(b) does not explicitly restrict itself to payments of post-judgment interest under section 1961(a) but rather sets out the time period during which post-judgment interest runs, regardless of the statutory source of the duty to pay such interest."[3] The provision was thus "at best ambiguous," and therefore did "not support an express waiver of the sovereign immunity of the United States." Pet. App. 13.

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[2]Even under petitioners' reading of the statute, interest would be available only in cases in which the United States took an unsuccessful appeal. This follows from 31 U.S.C. 1304, which establishes the permanent judgment appropriation fund. Section 1304(b)(1) provides that "[i]nterest may be paid from the appropriation made by this section—(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance." Petitioners acknowledge (Pet. 19) that any judgment in their favor would be paid from this fund.

[3]The court noted 28 U.S.C. 2516(b) and 2412(f) as examples of other statutes authorizing awards of post-judgment interest (Pet. App. 13 n.2).

Similarly, petitioners contended that Section 1961(c)(1), which sets out special rules for internal revenue cases, would be superfluous if Section 1961(a) did not require the payment of interest on all district court judgments against the United States. The court responded that Section 1961(c)(1) was necessary to exempt tax cases from the otherwise applicable timing provisions of Section 1961(b), whether or not Section 1961(a) were construed as petitioners argued (Pet. App. 15).

The court of appeals proceeded to reject petitioners' reliance on the Courts Improvement Act's legislative history. The "intent of Congress in adopting" the portion of the Act at issue here, the court explained, "was only to set a nationally uniform rate governing post-judgment interest in all cases, except tax cases, where post-judgment interest was already available" (Pet. App. 16). Petitioners also argued that, if their reading of Section 1961(a) is rejected, the Courts Improvement Act's repeal of Section 2411(b) would have the effect of making interest unavailable in FTCA and Little Tucker Act cases. But the court found it unnecessary to "decide the extent, if any, to which the Federal Courts Improvement Act curtails previously available post-judgment interest on judgments against the United States under the FTCA and the Tucker Act" (Pet. App. 23 (footnote omitted)), reasoning that "[e]ven if Congress did not intend to eliminate the liability of the United States for post-judgment interest in [those] cases, this does not mean that Congress affirmatively contemplated an expansion of the liability of the United States for post-judgment interest" (*id.* at 24).

3. Before this Court, petitioners repeat the arguments they made below. Because the court of appeals thoroughly examined and persuasively rejected those arguments—and because, in doing so, the court below joined the three other courts of appeals that have considered the issue in holding

that Section 1961 does not authorize awards of post-judgment interest against the United States in all cases[4]—further review is not warranted.

a. As this Court recently has explained:

> In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, see *McMahon* v. *United States*, 342 U.S. 25, 27 (1951), and not enlarge the waiver ' "beyond what the language requires," ' *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983), quoting *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927).

Library of Congress v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7. And even when Congress has authorized a substantive recovery against the United States, "interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress." Slip op. 5. This "no-interest rule provides an added gloss of strictness upon [the usual sovereign immunity] rules." *Id.* at 7.

This principle is dispositive here. Section 1961(a), of course, does not in terms make the United States liable for post-judgment interest. Petitioners' argument, instead, is that the enactment of Sections 1961(b) and (c) somehow reflects an unstated congressional intent to use Section 1961(a) as a waiver of the government's sovereign immunity. But this sort of implied waiver never is sufficient to make the United States liable for interest: " 'There can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute

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[4]See *International Woodworkers, Local 3-98* v. *Donovan*, 769 F.2d 1388, 1392 (9th Cir. 1985); *Arvin* v. *United States*, 742 F.2d 1301, 1304 (11th Cir. 1984); *Knights of the Ku Klux Klan* v. *East Baton Rouge Parish School Board*, 735 F.2d 895, 902 (5th Cir. 1984).

* * * to permit the recovery of interest suffice where the intent is not translated into affirmative statutory * * * terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.' " *Shaw*, slip op. 8 (quoting *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947)).

In any event, petitioners' argument from implication is flawed even on its own terms. In fact, as the court of appeals explained in detail, Sections 1961(b) and (c)(1) are rendered neither nugatory nor nonsensical by the court's reading of Section 1961(a). Thus petitioners contend that, unless Section 1961(a) makes the government liable for interest in all cases, there would be no need to except certain categories of government cases (those on appeal from the Federal Circuit and those paid out of the special judgment appropriation fund) from the rule governing the timing of interest payments set out in Section 1961(b) (see Pet. 16-17). The court of appeals correctly noted, however, that Section 1961(b)'s timing rule applies to interest payments authorized by *any* statute—not only those authorized by Section 1961(a) (Pet. App. 13).[5] Similarly, petitioners are incorrect in contending (Pet. 17) that Section 1961(c)(1), which excepts internal revenue cases from the rules established elsewhere in Section 1961,[6] would be superfluous unless the government were made liable by Section 1961(a). As the court of appeals

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[5]Petitioners argue (Pet. 22) that no other statutes in existence at the time of the enactment of the Courts Improvement Act authorized awards of interest. In fact, 28 U.S.C. 2516(a) allowed for payment of interest under contracts (or statutes) "expressly providing for payment thereof."

[6]Petitioners misstate the import of Section 1961(c)(1). They assert that it "provides that section 1961(a) shall not apply" to tax cases (Pet. 17). In fact, the provision states that "this section"—that is, *all* of Section 1961, including Sections 1961(b) and (c)(2)—does not apply in tax cases.

correctly explained, Section 1961(c)(1) is needed to except tax cases both from the timing rules contained in Section 1961(b) and from the rules governing appeals taken from the Federal Circuit set out in Section 1962(c)(2). As a result, "Section 1961(c)(1) would be necessary even if there was no section 1961(a) at all" (Pet. App. 15).[7] It may be added that, even apart from these more technical defects in petitioners' argument, an analysis that turns on such a convoluted and labored exegesis of Section 1961(a) hardly can provide the sort of unambiguous waiver of sovereign immunity required by this Court's decisions.[8]

b. Petitioners' reliance on the Courts Improvement Act's legislative history (Pet. 8-15) is equally without merit. Petitioners' principal argument from the history is that a proposed version of the Act would have made the United States liable for post-judgment interest in all cases (see Pet. 8)—and that Congress did not mean to change the bill's meaning when it dropped that language from the version of the Act that was enacted (see Pet. 9-15). This argument is, to say the least, farfetched. As the court of appeals noted, "[w]hen faced with a congressional amendment deleting a provision

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[7]Petitioners evidently recognize this; their only response (Pet. 23) is to suggest that Congress could have accomplished its purposes by other means. Even if that is true, petitioners' argument hardly establishes the proposition that Section 1961(c)(1) as written is superfluous.

[8]In a related vein, petitioners attempt to draw support from Section 1961(c)(2). That provision provides for post-judgment interest on "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit" (except in tax cases). Petitioners contend that Congress should be presumed to have wanted to make the United States liable, in a parallel manner, for interest on all district court judgments as well (Pet. 18). But petitioners draw precisely the wrong conclusion from Section 1961(c)(2). The obvious contrast between Sections 1961(c)(2) and 1961(a)—the former expressly makes the United States liable, while the latter makes no mention of suits against the United States—suggests that Congress intended to *exclude* suits against the United States from the operation of Section 1961(a).

from a bill under consideration, courts typically assume that Congress knows the content of its amendment and therefore intends the deletion" (Pet. App. 18). And the court properly added: "This is especially true where [petitioners] are asking this court to read a waiver of sovereign immunity back into a statute where Congress explicitly deleted that waiver. * * * [Petitioners'] inadvertence argument perverts the traditional rule that waivers of sovereign immunity must be express and must be strictly construed." *Id.* at 19.

There are other indications as well that petitioners' analysis of the legislative history is flawed. Petitioners do not point to a single statement in any of the history expressly stating that Congress intended to make the United States liable for post-judgment interest in all cases—an intention that would have broadened the government's liability considerably.[9] To the contrary, as the court of appeals demonstrated (at Pet. App. 21-22), there is considerable evidence that Congress had no such intention. In these circumstances, petitioners have failed to make the requisite unambiguous showing that Congress intended to expand the government's liability for interest. See *Shaw*, slip op. 5.

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[9]Petitioners rely on a statement by Senator Grassley; in explaining an amendment allowing awards of interest on Claims Court judgments to run only from the date of final judgment in the Court of Appeals for the Federal Circuit, he stated that "the new Claims Court would be placed in the unique position that does not apply to the judgments of the several district courts" (Pet. 14 (quoting 127 Cong. Rec. 29865 (1981)). But as the court of appeals explained, "[t]his statement does not explicitly say that all district court judgments against the United States will bear post-judgment interest. Given its context, we find more plausible an interpretation of Senator Grassley's remark as a reference to the fact that some district court judgments against the United States continued to bear post-judgment interest while no Claims Court judgment did." Pet. App. 20.

c. Finally, petitioners argue that, unless Section 1961(a) is read to make the government liable for interest in all cases, the Courts Improvement Act's repeal of Section 2411(b) will mean that post-judgment interest no longer is available against the government in FTCA and Little Tucker Act cases (Pet. 28-30). As the court of appeals explained (at Pet. App. 23), however, that issue is not in this case, which involves neither the FTCA nor the Little Tucker Act. Moreover, even if Congress intended to preserve the liability of the United States for post-judgment interest in cases involving those statutes—presumably by substituting liability under Section 1961(a) for liability under Section 2411(b) in FTCA and Little Tucker Act cases—that would not mean that Congress, in amending Section 1961, also "affirmatively contemplated an *expansion* of the liability of the United States for post-judgment interest" (Pet. App. 24 (emphasis added)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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